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June 3, 2011

Phil Isenberg, Chair
Delta Stewardship Council
980 9th Street, Suite 1500
Sacramento, CA 95814

Re: Comments on Proposed Administrative Procedures Governing Appeals and
Bay Delta Conservation Plan Standards of Review

Dear Chairmen Isenberg and Council Members:

As you are aware, the Department of Fish & Game (Department) is currently involved in efforts to develop the Bay Delta Conservation Plan (BDCP). The BDCP is being developed in compliance with the Federal Endangered Species Act (ESA) and the California Natural Community Conservation Planning Act (NCCPA). It is anticipated that the BDCP will provide the basis for the Department and the federal wildlife agencies to issue endangered species permits for the construction and operation of new Delta conveyance facilities, operations of the state and federal water projects, and implementation of other specified covered activities.

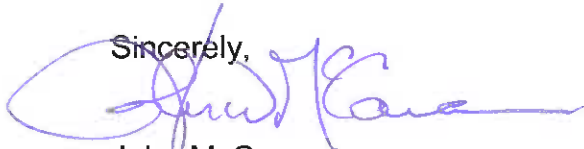
Upon approval of the BDCP, the Sacramento-San Joaquin Delta Reform Act (Delta Reform Act) requires the Department to submit a determination to the Delta Stewardship Council (Council) that the BDCP meets the requirements of Water Code section 85320. Pursuant to Water Code section 85225.30, any person may appeal that determination to the Council. Appendix A of the third staff draft of the Delta Plan sets forth the Council's proposed process for appeal and review of elements of the Delta Plan, including the process for review of the Department's determination. The Department has reviewed Appendix A and offers comments below to convey its understanding of the scope of the Council's appellate authority as it relates to the Department's determination that the BDCP meets the requirements of Water Code section 85320.

Section 23 of Appendix A states that the Council shall determine, based upon a preponderance of the evidence, whether the Department correctly determined that the BDCP meets all of the requirements of Water Code section 85320 for inclusion in the Delta Plan. If the Council does not agree with the Department's determination, then the BDCP will not be incorporated into the Delta Plan and the public benefits associated with the BDCP will not be eligible for state funding. However, the Council's determination will not, in any circumstance, affect the regulatory effect of the underlying determination by the Department that the BDCP complies with the NCCP Act. In other words, the Council's appellate authority is limited to whether or not the Department correctly determines that the BDCP

meets the requirements of the Delta Reform Act, not whether or not the Department appropriately determines that the BDCP qualifies as a NCCP. The Department believes this interpretation is consistent with the Delta Reform Act, current case law requiring deference to decisions by public agencies and the Memorandum of Understanding (MOU) entered into between the Department and the Council on January 4, 2011.

The Department is committed to working with the Council to ensure the BDCP will be appropriately included in the Delta Plan. If you have any questions about the content of this letter please contact Thomas Gibson, General Counsel, at (916) 654-3821.

Sincerely,



John McCamman
Director

ec: Joe Grindstaff, Director, California Bay Delta Authority
Chris Stevens, Chief Counsel, California Bay Delta Authority
Tom Gibson, Chief Counsel, Department of Fish and Game
Scott Cantrell, Acting Chief, Water Branch, Department of Fish and Game